No. SC92594

IN THE MISSOURI SUPREME COURT

Janet Chochorowski, individually and as the representative of a class of similarly situated persons,

Plaintiff-Appellant,

v.

Home Depot U.S.A., d/b/a/ The Home Depot,

Defendant-Appellee.

On Transfer from the Missouri Court of Appeals Eastern District, No. ED97339, there on appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri, No. 08SL-CC01183-01

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE HOME DEPOT U.S.A.

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Coffman v. Coffman, 414 S.W.2d 308 (Mo. 1967) 16

El Paso Services, L.P. v. MasTec North America, Inc.,

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First Nat. Ins. Co. of America v. Clark,

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Repair Masters Constr., Inc. v. Gary,

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Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351

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Sander v. Alexander Richardson Invs., 334 F.3d 712

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Sanger v. Yellow Cab Co., Inc., 486 S.W.2d 477

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Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,
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Union Elec. Co. v. Sw. Bell Tel. L.P., 378 F.3d 781
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§ 407.965 R.S.Mo. (2012) 21

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Miscellaneous

Blum, Brian A., *Contracts* § 1.4.1 (2d ed. 2001) 5

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Boudreaux, Tina, *Recent Development:* McAlpine v. McAlpine*:*
The Louisiana Supreme Court Reverses Its Stance on Antenuptial Waivers of Permanent Alimony, 71 Tul. L. Rev. 1339 (1997) 15-16

de Soto, Hernando, *The Mystery of Capital* 157 (2000) 9

Drahozal, Christopher R., *Privatizing Civil Justice:*
Commercial Arbitration and the Civil Justice System,
9 Kan. J.L. & Pub. Pol'y 578 (2000) 17

Epstein, Richard A., *In Defense of the Contract at Will*,
51 U. Chi. L. Rev. 947 (1984) 5

Epstein, Richard A., *Unconscionability: A Critical Reappraisal*,
18 J.L. & Econ. 293 (1975) 6

Kronman, Anthony T., *Paternalism and the Law of Contracts*,
92 Yale L.J. 763 (1983) 8

Nelson, Robert S., *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive Their Children's Tort Liability Claims*, 36 U.S.F. L. Rev. 535 (2002) 20

Rosenberg, Nathan & Birdzell, Jr., L.E., *How the West Grew Rich: The Economic Transformation of the Industrial World* (1986) 9

Rutledge, Peter B., *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151 (2004) 4, 17

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Sandefur, Timothy, *Right to Earn a Living* (2010) 17

Smith, Margaret M., *Originalism and Precedent: Note: Adhesion Contracts Don't Stick in Michigan: Why* Rory *Got it Right*, 5 Ave Maria L. Rev. 237 (2007) 14

The Home Depot rototiller, http://www.homedepot.com/webapp/catalog/servlet/Search?storeId=10051&langId=-1&catalogId=10053&keyword=rototiller&Ns=None&Ntpr=1&Ntpc=1&selectedCatgry=SEARCH+ALL (last visited Sept. 13, 2012). 19

STATEMENT OF INTEREST OF AMICUS

Pacific Legal Foundation was founded nearly 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important state and federal cases involving freedom of contract. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Feeney v. Dell, Inc.*, Mass. Supreme Judicial Ct. docket no. SJC-11133 (pending); *El Paso Services, L.P. v. MasTec North America, Inc.*, Texas Supreme Court docket no. 10-0648 (pending); *Stewart v. Chalet Vill. Props.*, 2009 Tenn. LEXIS 702 (Tenn. 2009); *Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc.*, 663 S.E.2d 240 (Ga. 2008); *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006), and *Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351 (Cal. 2003).

INTRODUCTION AND

SUMMARY OF ARGUMENT

Janet Chochorowski rented a garden tiller from Home Depot. Without reading the rental contract, she signed it and further initialed acceptance of an optional provision that imposed a fee in exchange for The Home Depot's waiver of any claims for damages against her if she negligently damaged the equipment. She was charged $2.50 for the damage waiver when she returned the undamaged tiller. Purporting to represent a class of consumers, she sued The Home Depot under the Missouri Merchandising Practices Act (MMPA), claiming that The Home Depot misrepresented the waiver as mandatory and that the waiver itself was worthless. The trial court ruled for Home Depot on summary judgment, and the court of appeals affirmed, properly focusing on the freedom of contract central to the liberty of all Missourians.

This Court should affirm the decision below. As an initial matter, Mrs. Chochorowski concedes that she signed a contract she did not read. Appellate Supplemental Brief at 2. In itself, this provides sufficient reason to dismiss her claims. But if this Court chooses to further analyze the contract, it should give no weight to the presumed gap of "sophistication" between the parties. Mrs. Chochorowski was competent to enter into contractual relationships and all competent adults should enjoy the freedom to contract — to both bind the actions of others and be bound themselves. Finally, damage

waivers are standard in both business contexts (as in the rental contract in this case) and in legal/judicial contexts (as in settlement of claims). Such waivers are not unfair, particularly when optional – although the simple rental of any item that is inessential to life is optional. The decision of the court of appeals should be affirmed.

POINTS RELIED UPON

I

FREEDOM OF CONTRACT

PROTECTS FUNDAMENTAL

PERSONAL AND SOCIAL VALUES

*_First Nat. Ins. Co. of America v. Clark_*, 899 S.W.2d 520, 521 (Mo. banc 1995)

Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 782 (Mich. 2003)

Monterosso v. St. Louis Globe-Democrat Publishing Co., 368 S.W.2d 481, 487, _cert. denied,_ 375 U.S. 908 (1963)

*Mo. Const. Art. I, § 13 (2012)

II

THIS COURT MUST ENFORCE

THE MINIMAL DUTIES EXPECTED

OF ALL CONTRACTING PARTIES

A. Consumers Are Expected To Read Their Contracts

**Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009)

**Sanger v. Yellow Cab Co., Inc*., 486 S.W.2d 477, 481 (Mo. banc 1972)

B. Lack of Sophistication Does Not Equal Incompetence

**Sander v. Alexander Richardson Invs*., 334 F.3d 712, 720 (8th Cir. 2003)

*Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151, 198 (2004)

III

DAMAGE WAIVER FEES ARE A STANDARD,

FAIR METHOD OF ALLOCATING RISK

**Blackstock v. Kohn*, 994 S.W.2d 947, 954 (Mo. 1999)

**Parks v. Union Carbide Corp*., 602 S.W.2d 188, 204 (Mo. 1980)

**Stahly Cartage Co. v. State Farm Mut. Auto. Ins. Co.*, 475 S.W.2d 438, 441-42 (Mo. Ct. App. 1971)

ARGUMENT

I

FREEDOM OF CONTRACT PROTECTS FUNDAMENTAL PERSONAL AND SOCIAL VALUES

The right to enter into contracts is an essential right in a free society, one which protects the right of people to make choices and to determine costs and benefits for themselves. *See Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 902 (Mo. banc. 1990) ("A system of free enterprise . . . promote[s] the use of contract by encouraging promisees to rely on the promises of others."). As Prof. Epstein notes, the freedom of contract is "an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs . . . and it is doubtless more persuasive than the desire to participate in political activity." Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947, 953 (1984). The "power to enter contracts and to formulate the terms of the contractual relationship is regarded in our legal system as an exercise of individual autonomy—an integral part of personal liberty." Brian A. Blum, *Contracts* § 1.4.1 (2d ed. 2001). This freedom "guarantee[s] to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties."

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 293-94 (1975). Professor Epstein explains, "if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world." *Id.*

Recognizing the freedom of contract as a fundamental personal right, Missouri courts have declared that "[if] there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice." *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, 26 (Ct. App. 1899), and *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 177 Mo. 559, 577-78 (1903). Thus, the general contract law in Missouri is that parties are free to contract about any subject matter, on any terms, and exceptions are found only when the parties are prohibited by statute or public policy, and injury to the public interest clearly appears. *First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995); *Willman v. Beheler*, 499 S.W.2d 770, 777 (Mo. 1973). Although courts retain the power to invalidate contracts that are contrary to public policy, such a power must not be abused so as to allow courts to make

choices for, and to re-write contracts for, people who should be free to make their own choices.

As the Michigan Supreme Court explained:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy . . . . The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens . . . . It is, in short, an unmistakable and ineradicable part of the legal fabric of our society.

Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 782 (Mich. 2003) (citation and footnotes omitted).

Often, contracting parties reach agreements which outsiders would consider undesirable, or even absurd. But so long as the parties are fully

informed of their bargain, and genuinely consent, the law will preserve their contract because no third party is in a better position to write the contract than the contracting parties themselves. "Our society is committed to the principle that, as long as they do not violate the rights of others, individuals may pursue their own conceptions of the good." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 794-95 (1983). Also, our "liberal ideal of a legal order does not discriminate among conceptions of the good" by "favoring some or disfavoring others on the grounds of their intrinsic merit." *Id.* at 795. Relying on such principles, this Court held, "[t]he courts cannot make contracts for litigants or rewrite contracts by judicial interpretation." *Monterosso v. St. Louis Globe-Democrat Publishing Co.*, 368 S.W.2d 481, 487, *cert. denied,* 375 U.S. 908 (1963) (internal citation omitted). Freedom of contract is recognized by the Missouri Constitution and the courts as a vital component to preserving individual liberty. *See* Mo. Const. Art. I, § 13 (2012).

In addition to the value of personal liberty, a state which lets individuals create their own agreements, and then provides an enforcement mechanism so that those agreements can be relied upon, fosters social prosperity. This is because such a state attracts and encourages entrepreneurship, investment, innovation, and exchange. When investors and traders can tailor agreements to meet their specific needs, they will be more willing and able to establish

new businesses and generate prosperity. *See* Hernando de Soto, *The Mystery of Capital* 157 (2000) ("Law is the instrument that fixes and realizes capital."); Nathan Rosenberg & L.E. Birdzell, Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* 116-17 (1986) ("[A] system of law which seeks to make the legal consequences of human action coherent and predictable . . . reduce[s] the risks of trading and investing" and is essential to economic growth.).

The ability of private individuals to contract as they choose is a fundamental part of their freedom. This Court has repeatedly declared that it is not the role of the courts to rewrite private agreements, unless expressly prohibited by statute or a clear injury to third parties exist. As long as a contract does not clearly violate legislatively established public policy or adversely affects nonconsenting third parties, the Court should uphold the validity of the contract.

II

THIS COURT MUST ENFORCE THE MINIMAL DUTIES EXPECTED OF ALL CONTRACTING PARTIES

A. Consumers Are Expected To Read Their Contracts

Beyond her own address printed at the top, Mrs. Chochorowski did not read the rental contract prior to signing it. Appellant Substitute Brief at 2 (citing LF 489, 888). It therefore doesn't matter whether the contract said "if applicable" or "optional" because *she did not read it before she signed it*.[1] In Missouri, as a general rule, "[a] party capable of reading and understanding a document is charged with the knowledge of its contents if he or she signs it, even if the party fails to review it." *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009). "The failure to read a document prior to signing it is not a defense, and does not make [the document] voidable, absent fraud." *Id.; see also Higgins v. American Car Co.*, 22 S.W.2d 1043, 1044 (1929) (Court rejected contracting party's excuse that he could not read without his glasses, holding: "The rule is that the one who signs a paper,

[1] Apparently the contract was not too difficult to read, because Mrs. Chochorowski read the text while in a moving car, on the ride home. Appellant Substitute Brief at 29.

without reading it, if he is able to read and understand, is guilty of such negligence in failing to inform himself of its nature that he cannot be relieved from the obligation contained in the paper thus signed, unless there was something more than mere reliance upon the statements of another as to its contents . . .." The court further noted that the plaintiff in that case, as in this one, was accompanied by a spouse who could read.). This is even true with regard to online contracts. *Major v. McCallister*, 302 S.W.3d 227, 230 (Mo. 2009) ("Failure to read an enforceable online agreement, as with any binding contract, will not excuse compliance with its terms. A customer on notice of contract terms available on the internet is bound by those terms.").

This Court has shown little patience with plaintiffs who complain about the consequences of their own failure to read important documents. *See Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477, 481 (Mo. banc 1972) ("The rule is that the one who signs a paper, without reading it, if he is able to read and understand, is guilty of such negligence in failing to inform himself of its nature that he cannot be relieved from the obligation contained in the paper thus signed, unless there was something more than mere reliance upon the statements of another as to its contents[.]" (internal quotations omitted)). For example, in the context of employees seeking to appeal the denial of unemployment benefits, the employees' claims are automatically dismissed if they fail to read and comply with the notice of hearing. *See Rice v. Three*

Rivers Healthcare, 167 S.W.3d 254, 256 (Mo. Ct. App. 2005) (Missouri Labor and Industrial Relations Commission did not err in determining that an employee's failure to read the notice properly was not good cause for her to miss her telephone hearing regarding her unemployment benefits claim and, subsequently, dismissed her appeal for failure to appear); *Jenkins v. Manpower*, 106 S.W.3d 620, 625 (Mo. Ct. App. 2003) (same). On a similar note, the court of appeals recently held in *Hoock v. Mo. Dep't of Revenue*, 2012 Mo. App. LEXIS 1069 *9 (Sept. 4, 2012), that an employee can be terminated, without eligibility for unemployment benefits, for violating the employment manual, despite her failure to read the manual: "We reject the notion that Missouri employment security law intends to reward an employee's voluntary and perpetual ignorance of employer policies in such a manner."

Even with the loss of liberty on the line, courts demand that prisoners read documents related to post-conviction relief if they have any hope of successfully challenging their sentences. *See Maghee v. Ault*, 410 F.3d 473, 476 (8th Cir. 2005) (failure to understand the plain language of the dismissal notice will not prevent post-conviction relief action from being dismissed). Courts also demand reading comprehension from debtors in bankruptcy court, and offer no relief to a debtor who fails to understand and comply with the required Schedules and Statements. *Lincoln Sav. Bank v. Freese (In re Freese)*, 460 B.R. 733, 739 (8th Cir. 2011).

What rule does this Court establish if it holds that a consumer should not be held responsible for reading her contracts, including using her own initiative to look at both sides of the paper, or asking her husband for help, rather than just signing where a sales representative points? What policy is established by the Court's acceptance of Mrs. Chochorowski's excuses? A consumer has every right and ability to say, "Hold on, I want to read this," and the sales representative will back off to give her that time. No sales representative is going to risk alienating a customer for failure to provide a requested break in the conversation to review the paperwork. The oral statements attributed to the Home Depot employee should not alter this analysis, for policy reasons aptly described by the Seventh Circuit:

> "[I]f a literate, competent adult is given a document that in readable and comprehensible prose says X . . . and the person who hands it to him tells him, orally, not X . . . our literate competent adult cannot maintain an action for fraud against the issuer of the document." . . . This principle is necessary to provide sellers of goods and services, including investments, with a safe harbor against groundless, or at least indeterminate, claims of fraud by their customers. Without such a principle, sellers would have no protection against plausible liars and gullible jurors.

Carr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996).

Mrs. Chochorowski's excuses for signing a contract she did not read simply should not be allowed to stand as precedent for future parties who wish to rely on willful ignorance as a means for voiding a contract. *See* Margaret M. Smith, *Originalism and Precedent: Note: Adhesion Contracts Don't Stick in Michigan: Why* Rory *Got it Right*, 5 Ave Maria L. Rev. 237, 268 (2007) ("There are many examples of difficult reading material—state statutes, prescription drug pamphlets, federal tax forms—but no one can file a claim for relief from any of these based on the fact that 'no one ever reads them' or that the language is complicated.").

B. Lack of Sophistication Does Not Equal Incompetence

"Sophisticated parties have freedom of contract—even to make a bad bargain, or to relinquish fundamental rights." *Purcell Tire & Rubber Co., Inc. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. 2001) (en banc); *cf. Union Elec. Co. v. Sw. Bell Tel. L.P.*, 378 F.3d 781, 788 (8th Cir. 2004) (rejecting an unclean hands argument because "[w]here two sophisticated commercial enterprises allocate their risk of loss by contract as between them, no public policy is violated"). This Court should extend the *Purcell* rule to permit freedom of contract for all consumers, and decline to base a paternalistic ruling on a presumed gap of sophistication between renters and businesses.

In an Eighth Circuit case arising out of St. Louis County, the court rejected the plaintiff's claimed lack of sophistication as a reason to invalidate an exculpatory clause in a yacht slip rental contract. The court held: "It is not enough to assert that one party was less sophisticated than the other. There must be some evidence that the party holding the superior bargaining power exerted that power in overreaching the less sophisticated party by, for example, engaging in fraud or coercion or by insisting on an unconscionable clause." *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 720 (8th Cir. 2003). The court upheld the exculpatory clause that "clearly and unequivocally shifted the risk of loss to the boat owner and released the Yacht Club from all liability, including that liability arising from its own negligence. Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract." *Id.* at 721.

In the context of prenuptial agreements, disparate bargaining positions will almost always be a factor between the parties. But this factor alone has rarely been a valid reason for declaring a contract unconscionable, in part because an assumption that the financially weaker, perhaps less sophisticated, party is incapable of entering into an prenuptial agreement with competence imposes a improperly paternalistic policy. Tina Boudreaux, *Recent Development:* McAlpine v. McAlpine*: The Louisiana Supreme Court Reverses Its Stance on Antenuptial Waivers of Permanent Alimony*, 71 Tul. L.

Rev. 1339, 1357 (1997). This rule applies during a marriage, *Coffman v. Coffman*, 414 S.W.2d 308, 313 (Mo. 1967) ("In Missouri, a wife is competent to contract with her husband."), and upon a marriage's dissolution. *Hughes v. Davidson-Hues*, 330 S.W.3d 114, 118 (Mo. Ct. App. 2012) (divorcing spouses may agree that their property settlement rights will survive in the event that a judgment incorporating the contract's terms becomes unenforceable, without violating any public policy).

Whether "sophistication" is a matter for judicial inquiry is an issue that arises in some arbitration cases. *See e.g.*, *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011). But there is no reason to assume that courts could easily and fairly classify contracts as among "sophisticated" parties versus "unsophisticated" parties. An arbitration agreement between General Electric and a Hungarian start-up company may reflect a far greater relative inequality in bargaining power than, for example, a contract between a local merchant and a sophisticated investor. At best, the consumer-contract criticism would yield a world that is over-inclusive and under-inclusive. At worst, it would yield an uncertain world in which neither courts nor parties could be certain whether a particular agreement qualified for commercially sophisticated treatment. Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151, 198 (2004).

See Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol'y, 578, 587-88 (2000) ("[C]ourts that decide not to enforce arbitration agreements . . . can impose costs on the parties. Courts can't just hold something unconscionable without consequences. Given that sophisticated parties find these arbitration agreements beneficial, it seems to me that there is evidence that they may be beneficial to unsophisticated parties as well.").

The MPPA is not intended to alter the rules related to a person's competency to enter into valid contracts. Competence does not require "sophistication." Missouri law says simply that anyone at least 18 years old is competent to contract. § 431.055 R.S.Mo. (2012); *Holoman v. Harris*, 585 S.W.2d 530, 534 (Mo. Ct. App. 1979). Missouri adults are also presumed competent to draft proposed legislation, Mo. Const. Art. III, § 49. Given the equal measure of competence designated to engage in political and economic activity, it makes little sense to treat economic freedom as a dangerous threat requiring judicial paternalism, while upholding the right to political participation as a fundamental right of all mature adults. *See* Timothy Sandefur, *Right to Earn a Living* 281 (2010). "If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be

enforced by courts of justice." *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, 26 (Ct. App. 1899), and *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 177 Mo. 559, 577-578 (1903). Just as not every breach of contract constitutes an unfair practice under the MMPA, *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 234 (Mo. Ct. App. 2006), neither is voluntarily allocation of risk.

III

DAMAGE WAIVER FEES ARE A STANDARD, FAIR METHOD OF ALLOCATING RISK

The right to recover the full extent of damages is a commodity that, like all commodities, can be traded, and parties ought to be free to trade this commodity for mutual advantage. Here, Mrs. Chochorowski chose to pay an additional $2.50 fee in exchange for reduced risk, *i.e.* the decreased possibility that she would incur costs from future damages. Damage waiver agreements are intended to benefit both parties. While Mrs. Chochorowski had the choice to pay less up-front in exchange for an increased risk of incurring costs due to any future damages, she chose not to exercise that option. Private individuals and businesses allocate costs and benefits everyday in the free market in order to customize bargains to meet their needs. For example, an investor may choose to pay more for less risky stocks, or a business owner may choose to lock in a higher price for necessary goods in exchange for the assurance of

delivery at a specified date and time. Similarly, The Home Depot provided Mrs. Chochorowski (and other Missouri do-it-yourselfers) with an overall lower cost of service because it could bargain for reduced litigation expenses.

If someone rents a rototiller, the general expectation is that she will return it intact, without damage and in regular working order. Typical rental contracts would require her to pay for repair or replacement. A damage waiver provides a measure of certainty in the transaction that negligent damage of the rental property will not result in potentially major costs.[2]

When the situation is reversed, and the company negotiates liability limitations to immunize itself from future lawsuits and uncertain costs, these contracts are a useful and beneficial device to allow businesses to manage their exposure to risk and still provide goods and services to the public. When used effectively, liability limitations and waivers "help lower operating expenses and thereby enable a greater number of providers to compete in the marketplace." Robert S. Nelson, *The Theory of the Waiver Scale: An Argument Why Parents Should be Able to Waive Their Children's Tort*

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[2] The Home Depot offers gas-powered rototillers for sale in a range of $350-$800. http://www.homedepot.com/webapp/catalog/servlet/Search?storeId=10051&langId=-1&catalogId=10053&keyword=rototiller&Ns=None&Ntpr=1&Ntpc=1&selectedCatgry=SEARCH+ALL (last visited Sept. 13, 2012).

Liability Claims, 36 U.S.F. L. Rev. 535, 537 (2002). In turn, consumers benefit by lower costs, a greater availability of goods and services, and a more stable economy in which to invest their savings. Courts routinely uphold these types of exculpatory clauses. *See Grand Motors, Inc. v. Ford Motor Co.*, 564 F. Supp. 34, 38 (W.D. Mo. 1982) ("The policy of the law being to encourage freedom of contract and the peaceful settlement of disputes, . . . a release will be presumed valid and, as an affirmative defense, may be given effect by means of summary judgment."); *Blackstock v. Kohn*, 994 S.W.2d 947, 954 (Mo. 1999) ("Executed releases are presumptively valid."); *Malan Realty Investors v. Harris*, 953 S.W.2d 624, 626 (Mo. 1997) ("Our courts have held that a party may contractually relinquish fundamental and due process rights.").

Courts also uphold settlement agreements that agree to waive future claims, even if, in hindsight, the injured party does not receive full compensation for her injuries. *See Parks v. Union Carbide Corp*., 602 S.W.2d 188, 204 (Mo. 1980) ("[If] the plaintiff settles with one tortfeasor for less than that tortfeasor's proportionate fault, the difference usually will be attributable to the value of quick and certain recovery. Any difference not so explained may be the result of a bad bargain."); *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 482 (Mo. banc 1972). ("[T]the general rule of freedom of contract includes the freedom to make a bad bargain."); *Stahly Cartage Co. v. State*

Farm Mut. Auto. Ins. Co., 475 S.W.2d 438, 441-42 (Mo. App. 1971) ("A document termed a release is in essence a written contract of compromise and settlement . . . . A written contract, fairly entered into, would be no more than a scrap of paper if it was not binding on both parties according to its terms . . . .").

The ubiquity of waivers is also reflected in the very few types of waiver that Missouri law expressly refuses to permit. *See, e.g.*, § 407.915(2) R.S.Mo. (2012) (a "provision in any contract between a sales representative and a principal purporting to waive any provision of sections 407.911 to 407.915 [regarding payment of accrued sales commissions], whether by expressed waiver or by a contract subject to the laws of another state, shall be void"); § 407.965 R.S.Mo. (2012) ("Any waiver by a consumer of rights under sections 407.950 to 407.970 [relating to merchantability of assistive devices for major life activities] is void."). As a matter of law (*see* cases cited *supra*) and standard business practice, most contractual waivers are valid. *See, e.g.,* § 338.015 R.S.Mo. (2012) ("However, nothing in sections 338.010 to 338.315 [regulating pharmacies and pharmacists] abrogates the patient's ability to waive freedom of choice under any contract with regard to payment or coverage of prescription expense."). There is nothing inherently "unfair" about a damage waiver in exchange for consideration of a fee.

CONCLUSION

The decision of the court below should be affirmed.

DATED: October 12, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that pursuant to Rule 84.06(c), (1) this brief contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 4, 660 words, exclusive of the sections exempt by Rule 84.06(b), determined using the word count program in WordPerfect.

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